Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–562 OF 2002
AZIAH ALI J
8 MARCH 2010

Contract — Breach — Allegation of — Tender — Three-party joint venture — Pre-tender agreement — Plaintiff promised work arising from project — Failure to honour promise — Whether agreement between plaintiff and first defendant only — Three party joint venture relationship not mentioned in agreement — Second and third defendants not parties to agreement — Whether first defendant breached pre-tender agreement — Whether second and third defendants bound by pre-tender agreement

The plaintiff, a company registered in Malaysia, was engaged in the business of building and civil engineering construction. The first and second defendants were also companies incorporated in Malaysia and were involved in the business of building and civil engineering construction works with the first defendant being engaged principally as earthworks contractor. The plaintiff claimed that the first and second defendants were part of a group of companies managed and/or controlled by the Yip family with common and/or connected officers and shareholders. The third defendant was a local bumiputra entity involved in the business of building construction. The second and third defendants were partners in a joint venture ('the AAY-MMN JV'). The plaintiff's claim arose out of a project known as 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina Dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur' ('the project'). The plaintiff claimed that the first and second defendants invited the plaintiff to jointly participate with them in a joint venture between the plaintiff, the first and second defendants (the three-party joint venture) to submit a tender to the Pahang Water Department in respect of the project. According to the plaintiff, upon the AAY-MMN JV securing the said project, the plaintiff would be awarded a portion of the works arising from the said project. Pursuant to the said joint venture, the plaintiff proceeded to prepare the tender. Numerous meetings were conducted between the plaintiff through its representatives, PW1 and PW2 who were with the plaintiff's company from 1997 till June 2000. The plaintiff stated that the first and second defendants on most occasions were represented by one Ng Kai Wai and DW1. This three-party joint venture was later followed by a 'pre-tender agreement' executed by the plaintiff and the first defendant. The pre-tender agreement envisaged the entire project being subcontracted

by the AAY-MMN JV (between the second and third defendants) to the first defendant. The first defendant would then subcontract the plaintiff's portion of the project to the plaintiff. However, the second and third defendants did enter into a joint venture agreement whereby the third defendant held a majority of 70% shareholding and the second defendant held 30%. The said project was awarded to the AAY-MMN JV. The plaintiff contended that DW1 was the alter ego of the second and third defendants. Further, the plaintiff contended that having regard to, inter alia, the relationship between the parties arising from the three-party joint venture and further upon the defendants having obtained the benefits of the plaintiff's input and efforts, the defendants, in particular the first and second defendants, were under the implied obligation not to act in any manner inconsistent with the three-party joint venture on the plaintiff's portion and to cooperate and take all necessary steps to ensure that the plaintiff be awarded the plaintiff's portion. With regard to the third defendant, the plaintiff contends that the third defendant was bound by the pre-tender agreement on the plaintiff's portion on the basis that the AAY-MMN JV between the second and third defendants was in substance a partnership. The plaintiff claimed, inter alia, an order for specific performance of the said agreement for the plaintiff's portion. At the trial, the parties agreed that the issue for the determination by this court was on liability with the issue of quantum of damages to be assessed by the registrar.

Held, dismissing the plaintiff's claims against the first, second and third defendants with costs and allowing the first defendant's counterclaim with costs:

(1) The pre-tender agreement is a culmination of the negotiations between the plaintiff and the first defendant and this agreement embodies all the terms and conditions that the plaintiff and the first defendant intended to rely on to regulate their relationship. The pre-tender agreement manifests the intention of the parties and by virtue of ss 91 and 92 of the Evidence Act 1950, no oral evidence may be adduced to contradict or vary the terms of the agreement (see para 40).

(2) Both the plaintiff and the first defendant as contracting parties knew the terms and conditions of the pre-tender agreement. There was no mention in this agreement of any three-party joint venture relationship. If at all there was a three-party joint venture as claimed by the plaintiff, it would appear that such alleged joint venture did not materialise by the time the pre-tender agreement was executed. The pre-tender agreement was the only contract executed between the plaintiff and the first defendant. There were no written agreements between the plaintiff and the second defendant, much less the third defendant with whom the plaintiff had no direct dealing at all (see para 41).

(3) From the evidence, the tender price submitted by the AAY-MMN JV to Pahang Water Department was lower than the quotation submitted by the first defendant. The AAY-MMN JV was only prepared to offer the subcontract to the first defendant at RM63m. Consequently the plaintiff was requested to review its price in order to enable the first defendant to accept the offer from the AAY-MMN JV to be its subcontractor. There was evidence that the plaintiff had refused to lower their rates from the sum set out in the pre-tender agreement (see para 44).

(4) It was not disputed that the first defendant was not awarded the project. The pre-tender agreement clearly provided that if the first defendant is not awarded the subcontract, the pre-tender agreement would become void. Therefore upon the happening of the event, the legal relationship between the plaintiff and the first defendant ended. The pre-tender agreement no longer subsisted (see para 45).

(5) The second and third defendants were not parties to the pre-tender agreement. The evidence of PW1 showed that there was never any representation made by DW1 that he was representing the second defendant or the third defendant in his negotiations with the plaintiff which culminated in the pre-tender agreement. Although DW1 was the project director for the second defendant, he could not deal with the plaintiff as a representative of the second defendant in view of the fact that the second defendant was a partner in the AAY-MMN JV and any decision if made on behalf of the second defendant would have to take into account the third defendant who was the majority shareholder and the controlling partner in the AAY-MMN JV (see paras 47–48).

(6) In so far as the joint venture was concerned, DW4 was regarded as the person in control and the third defendant as the controlling partner. Though the evidence suggested that works on the project was undertaken by the second defendant, the third defendant was involved in the supply of machinery, building equipment and construction materials for the project. There was nothing to suggest that the AAY-MMN JV was not genuine (see para 49).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat yang didaftarkan di Malaysia, terlibat dalam perniagaan pembinaan bangunan dan kejuruteraan sivil. Defendan pertama dan kedua juga merupakan syarikat-syarikat yang ditubuhkan di Malaysia dan terlibat dalam perniagaan kerja-kerja pembinaan bangunan dan kejuruteraan sivil dengan defendan pertama terutamanya terlibat dalam kontraktor kerja tanah. Plaintif menyatakan bahawa defendan pertama dan kedua adalah sebahagian kumpulan syarikat yang diuruskan dan/atau dikawal oleh keluarga Yip dengan pegawai-pegawai dan pemegang-pemegang syarikat

yang sama dan/atau berkaitan. Defendan ketiga adalah entiti bumiputra tempatan yang terlibat dalam perniagaan pembinaan bangunan. Defendan kedua dan ketiga adalah rakan kongsi dalam usaha sama ('AAY-MMN JV'). Tuntutan plaintif berbangkit daripada projek yang dikenali sebagai 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina Dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur' ('projek tersebut'). Plaintif menyatakan bahawa defendan pertama dan kedua menjemput plaintif untuk mengambil bahagian dengan mereka di dalam usaha sama dengan plaintif, defendan pertama dan kedua (usaha sama tiga pihak) untuk mengemukakan tender kepada Jabatan Air Pahang berkaitan dengan projek tersebut. Menurut plaintif, atas AAY-MMN JV mendapat projek tersebut, plaintif akan diawardkan sebahagian kerja berikutan projek tersebut. Berikutan usaha sama tersebut, plaintif meneruskan untuk menyiapkan tender. Beberapa mesyuarat telah diadakan di antara plaintif melalui wakilnya, PW1 dan PW2 yang bersama syarikat plaintif dari tahun 1997 hingga Jun 2000. Plaintif menyatakan bahawa defendan pertama dan kedua dalam banyak masa diwakili oleh seorang yang bernama Ng Kai Wai dan DW1. Usaha sama tiga pihak ini kemudiannya diikuti oleh 'pre-tender agreement' yang ditandatangani oleh plaintif dan defendan pertama. Perjanjian pra-tender tersebut membayangkan keseluruhan projek yang diberikan sebagai subkontrak oleh AAY-MMN JV (di antara defendan kedua dan ketiga) kepada defendan pertama. Defendan pertama kemudian akan memberikan subkontrak bahagian projek plaintif kepada plaintif. Walau bagaimanapun, defendan kedua dan ketiga sememangnya menandatangani perjanjian usaha sama di mana defendan ketiga memegang 70% saham dan defendan kedua 30%. Projek tersebut diberikan kepada AAY-MMN JV. Plaintif menghujah bahawa DW1 merupakan alter ego defendan kedua dan ketiga. Selanjutnya, plaintif menghujah bahawa disebabkan oleh, antara lain, hubungan di antara pihak-pihak berikutan usaha sama tiga pihak dan selanjutnya hasil daripada defendan-defendan memperoleh faedah-faedah maklumat dan usaha plaintif, defendan-defendan, khususnya defendan pertama dan kedua, mempunyai kewajipan tersirat untuk tidak bertindak dalam apa-apa cara yang tidak konsisten dengan usaha sama tiga pihak atas bahagian plaintif dan untuk bekerjasama dan mengambil kesemua langkah yang perlu untuk memastikan bahawa plaintif diawardkan bahagian plaintif. Berkaitan dengan defendan ketiga, plaintif menghujah bahawa defendan ketiga terikat oleh perjanjian pra-tender atas bahagian plaintif atas alasan bahawa AAY-MMN JV di antara defendan kedua dan ketiga pada asasnya adalah suatu perkongsian. Plaintif menuntut, antara lain, satu perintah untuk pelaksanaan spesifik perjanjian tersebut untuk bahagian plaintif. Semasa perbicaraan, pihak-pihak bersetuju bahawa isu yang perlu diputuskan oleh mahkamah ini adalah atas liabiliti dengan isu kuantum ganti rugi ditaksir oleh pendaftar.

Diputuskan, menolak tuntutan-tuntutan terhadap defendan-defendan pertama, kedua, dan ketiga plaintif dengan kos dan membenarkan tuntutan balas defendan pertama dengan kos:

(1) Perjanjian pra-tender adalah hasil perundingan di antara plaintif dan defendan pertama dan perjanjian ini termasuk kesemua terma-terma dan syarat-syarat bahawa plaintif dan defendan pertama berniat untuk menyandar untuk melaraskan hubungan mereka. Perjanjian pra-tender tersebut menunjukkan dengan jelas niat pihak-pihak dan disebabkan oleh ss 91 dan 92 Akta Keterangan 1950, tidak ada keterangan lisan yang boleh dikemukakan untuk menyangkal atau menukar terma-terma perjanjian (lihat perenggan 40).

(2) Kedua-dua plaintif dan defendan pertama sebagai pihak yang berkontrak mengetahui terma-terma dan syarat-syarat perjanjian pra-tender tersebut. Tidak ada pernyataan di dalam perjanjian ini tentang mana-mana hubungan usaha sama tiga pihak. Jika terdapat usaha sama tiga pihak seperti yang dinyatakan oleh plaintif, ia akan kelihatan bahawa usaha sama yang didakwa tidak menjadi pada masa perjanjian pra-tender ditandatangani. Perjanjian pra-tender merupakan satu-satunya kontrak yang ditandatangani di antara plaintif dan defendan pertama. Tidak ada perjanjian bertulis di antara plaintif dan defendan kedua lebih-lebih lagi defendan ketiga yang dengannya plaintif tidak mempunyai urusan secara langsung sama sekali (lihat perenggan 41).

(3) Daripada keterangan, harga tender yang dikemukakan oleh AAY-MMN JV kepada Jabatan Air Pahang adalah lebih rendah daripada sebut harga yang dikemukakan oleh defendan pertama. AAY-MMN JV hanya disediakan untuk menawarkan subkontrak kepada defendan pertama pada harga RM63 juta. Oleh itu plaintif diminta menyemak harganya untuk membolehkan defendan pertama menerima tawaran AAY-MMN JV untuk menjadi subkontraktornya. Terdapat keterangan bahawa plaintif enggan menurunkan harganya daripada jumlah yang dikemukakan di dalam perjanjian pra-tender (lihat perenggan 44).

(4) Tidak dipertikaikan bahawa defendan pertama tidak diawardkan projek tersebut. Perjanjian pra-tender tersebut jelas memperuntukkan bahawa jika defendan pertama tidak diawardkan subkontrak tersebut, perjanjian pra-tender akan menjadi batal. Oleh demikian dengan berlakunya perkara tersebut, hubungan sah di antara plaintif dan defendan pertama tamat. Perjanjian pra-tender tidak lagi wujud (lihat perenggan 45).

(5) Defendan kedua dan ketiga bukan pihak kepada perjanjian pra-tender tersebut. Keterangan PW1 menunjukkan bahawa tidak ada apa-apa representasi dibuat oleh DW1 bahawa dia mewakili defendan kedua

atau defendan ketiga dalam perundingan dengan plaintif yang berakhir dengan perjanjian pra-tender. Walaupun DW1 adalah pengarah projek untuk defendan kedua, dia tidak dapat berurusan dengan plaintif sebagai wakil defendan kedua melihat kepada fakta bahawa defendan kedua merupakan rakan kongsi AAY-MMN JV dan apa-apa keputusan jika dibuat bagi pihak defendan kedua akan mengambilkira defendan ketiga yang merupakan pemegang saham majoriti dan rakan kongsi yang mengawal di dalam AAY-MMN JV (lihat perenggan 47–48).

(6) Setakat yang berkaitan dengan usaha sama, DW4 dianggap sebagai orang yang mempunyai kuasa dan defendan ketiga sebagai rakan kongsi yang mengawal. Walaupun keterangan menyarankan kerja-kerja berkaitan projek tersebut dibuat oleh defendan kedua, defendan ketiga terlibat di dalam pembekalan mesin, barangan bangunan dan barangan pembinaan untuk projek tersebut. Tidak ada apa-apa yang menyarankan bahawa AAY-MMN JV tidak tulen (lihat perenggan 49).]

Notes

For cases on breach in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2566–2823.

Legislation referred to

Evidence Act 1950 ss 91, 92

Michael Chow (Barbara Wong with him) (Michael Chow) for the plaintiff.
HV Yoong (Ho & Co) for the first defendant.
Justin Voon (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the second defendant.
Vijay Kumar (Denise Leong with him) (Kumar Jaspal Quah & Aishah) for the third defendant.

Aziah Ali J:

[1] The plaintiff is a company registered in Malaysia and is engaged in the business of building and civil engineering construction. The first and second defendants are companies incorporated in Malaysia and are involved in the business of building and civil engineering construction works with the first defendant being engaged principally as earthworks contractor. The plaintiff claims that the first and second defendants are part of a group of companies managed and/or controlled by the Yip family with common and/or connected officers and shareholders. Both the first and second defendants deny this and aver that the first and second defendants are separate entities with no common directors and shareholders. The third defendant is a local bumiputra entity involved in the business of building construction. The second and third defendants are partners in a joint venture ('the AAY-MMN

joint venture').

BACKGROUND

[2] The plaintiff's claim arose out of a project known as 'Rancangan Bekalan Air Greater Kuantan Fasa II–Pakej 3 Membina Dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur' ('the project'). The plaintiff claims that it was invited by the first and second defendants to jointly participate with them in a joint venture between the plaintiff, the first and second defendants ('the three-party joint venture') to submit a tender to the Jabatan Bekalan Air Negeri Pahang Darul Makmur in respect of the project. According to the plaintiff on the basis and pursuant to the said joint venture, the plaintiff proceeded to prepare the tender. Numerous meetings were conducted between the plaintiff through its representative, PW1 and CP Lim ('PW2') who was with the plaintiff company from 1997 till June 2000. The plaintiff say that the first and second defendants on most occasions were represented by one Ng Kai Wai and DW1 Yip Kok Weng.

[3] According to the plaintiff the essential features and the basic understanding of the three-party joint venture between the plaintiff and the first and second defendants were as follows:

(a) given the plaintiff's experience in such and/or related field of engineering and construction works, the plaintiff was requested by the first and second defendants to provide its expertise in the preparation of the tender for the said project which included aspects of pricing for the tender and preparations of the work programs and technical schedules;

(b) the tender for the said project would, however, be submitted through another joint venture between the second defendant and the third defendant (the 'AAY-MMN joint venture');

(c) upon the AAY-MMN joint venture securing the said project, the plaintiff would be awarded a portion of the works arising from the said project ('the plaintiff's portion') with the balance to be shared by and/or between the first and second defendants ('the excluded portion').

The plaintiff says that the works for the project were divided into 12 sections. Upon the conclusion of the said tender preparation exercise the plaintiff says that it was agreed as follows:

(a) all works under bill sections D, E, F, G, H, I, J, K and L and part of the works under section A arising under what is known as 'method related charges' would fall under the plaintiff's portion for which the plaintiff had priced at RM37,994,385.80 and RM3,939,200 respectively ('the plaintiff's portion');

(b) the balance works falling under sections B and C as well as those remaining under section A would come under the excluded portion for which the plaintiff had priced at RM19,442,147.10.

The total tender price prepared by the plaintiff was RM61,375,732.90 excluding the portions for bonds, insurance and CIDB contribution.

[4] This three-party joint venture was later followed by a 'pre-tender agreement' executed on 9 August 2001 by the plaintiff and the first defendant (exh P13). This pre-tender agreement envisaged the entire project being subcontracted by the AAY-MMN joint venture (between the second and third defendants) to the first defendant. The first defendant would then subcontract the plaintiff's portion of the project to the plaintiff. The second and third defendants did enter into a joint venture agreement dated 10 January 2001 ('the JVA') and a supplemental agreement dated 1 October 2001 ('the SA') whereby the third defendant holds a majority of 70% shareholding and the second defendant holds 30%. According to the plaintiff by mid August 2001 the defendants submitted the tender for the project through the AAY-MMN joint venture. The plaintiff says the tender was submitted using, amongst others as the starting basis, the prices which the plaintiff had prepared. By a letter dated 18 January 2002 the Jabatan Bekalan Air Negeri Pahang Darul Makmur awarded the said project to the AAY-MMN joint venture for a total contract sum of RM69,300,000.

[5] The plaintiff contend that Yip Kok Weng (DW1) is the alter ego of the second and third defendants. The plaintiff contends that having regard to, inter alia, the relationship between the parties arising from the three-party joint venture and further upon the defendants having obtained the benefits of the plaintiff's input and efforts, the defendants, in particular the first and second defendants were under the implied obligation not to act in any manner inconsistent with the three-party joint venture on the plaintiff's portion and to cooperate and take all necessary steps to ensure that the plaintiff be awarded the plaintiff's portion.

[6] With regard to the third defendant it is the plaintiff's contention that the third defendant was aware of the understanding and agreement between the plaintiff and the first and second defendants, and that even if the third defendant denies this, as the third defendant was the second defendant's joint venture partner in the AAY-MMN joint venture, therefore the third defendant is bound by the acts of the second defendant, its joint venture partner. The plaintiff contends that the third defendant is bound by the pre-tender agreement on the plaintiff's portion on the basis that the AAY-MMN joint venture between the second and third defendants is in substance a partnership or alternatively the second defendant was at all material times the lead partner within the AAY-MMN joint venture de jure

and/or de facto control thereof. However according to the plaintiff, notwithstanding the award of the project to the AAY-MMN joint venture, and despite various reminders and demands by the plaintiff, the plaintiff claims that the defendants have, in breach of the three-party joint venture and the JVA, failed and/or refused to award or cause to be awarded to the plaintiff the plaintiff's portion of the project.

[7] By way of this action the plaintiff prays for the following reliefs:

(a) a declaration that the joint venture was constituted and continues to subsist between the plaintiff and the first and second defendants;

(b) a declaration that the defendants through the MY-MMN joint venture hold the plaintiff's portion as constructive trustees for the plaintiff;

(c) an account of the profits made by the defendants from the plaintiff's portion;

(d) an order for specific performance of the said agreement for the plaintiff's portion as evidenced by, inter alia, the pre-tender agreement;

(e) an order that the defendants pay to the plaintiff the profits found to have been made by them on the taking of account;

(f) damages in lieu of and/or in addition to the order for specific performance to be assessed against the defendants;

(g) a declaration that the information and documents, including in particular, the work program and technical schedules, produced in the course of and/or forming part of the said tender submitted by the AAY-MMN joint venture are property of the plaintiff;

(h) such other orders or directions as this honourable court deems just and fit;

(i) interest; and

(j) costs.

At the trial counsel for the plaintiff Mr Michael Chow informed the court that it has been agreed that the issue for determination by the court is liability with the issue of quantum of damages to be assessed by the registrar.

THE PLAINTIFF'S CASE

[8] The evidence for the plaintiff came primarily from PW1, BC Kok who is a director of the plaintiff. PW1 said in respect of the project he dealt primarily with DW1, Yip Kok Weng. PW1 said it was his impression that DW1 as the eldest son made all the decisions in the YCS group of companies. The other person he dealt with was Ng Kai Wai, the contracts manager for

DW1. According to PW1 it was Ng Kai Wai who contacted him some time between 5 and 10 July 2001 about DW1's request for assistance for the structural quotation for the project.

[9] PW1 then spoke to CP Lim (PW2) who has experience in dam constructions. PW2 agreed but wanted the plaintiff's involvement to be formalised. PW1 then called DW1 who told him that he (DW1) has strong connections to get the project through the assistance of the third defendant based in Kuantan and well connected. PW1 said he told DW1 he wanted to form a joint venture to bid for the tender for the project. According to PW1 he was told by DW1 that he would give all other works except earthworks which DW1 is interested in.

[10] On 20 July 2001 PW2 and DW1 visited the project site. Subsequently at a meeting with DW1 attended by PW1, PW2, CP Lim and Ng Kai Wai, PW1 said that he proposed a joint venture between the plaintiff and the second defendant. On DW1's request PW1 said he came up with a draft 'pre-bid agreement' which proposed a joint venture between the plaintiff and the second defendant. He gave this first draft to DW1.

[11] Subsequently PW1 said DW1 told him that the plaintiff and the second defendant would not bid directly but the bid would be made through the AAY-MMN joint venture and this joint venture would then subcontract the entire project to the second defendant. PW1 then prepared a second draft (exh P6) which provided for a joint venture between the plaintiff and the second defendant to which the AAY-MMN joint venture would subcontract the entire works. PW1 said he was not told the details of the role of the third defendant in the tender. He understood that the third defendant was the local contact to assist in securing the project.

[12] Pursuant to the understanding that DW1 was only interested in the earthworks and the remaining works would be given to the plaintiff, PW1 said that the works falling under sections D, E, F, G, H, I, J, K and L of the bill of quantities together with works under section A ('method related charges') would be done by the plaintiff and the remaining works relating to earthworks would be carried out by DW1.

[13] PW1 said he prepared a third draft of the pre-bid agreement (exh P10) because DW1 said the second draft was too complicated. He passed the third draft to DW1 at a meeting in Kuantan with the third defendant. However due to the extension of the date for submission of the tender (exh D30), he did not pursue the third draft with DW1.

[14] PW1 said the base price of the tender worked out by him and CP Lim was RM61,875,732.90 and it was up to DW1 to mark up the price to the AAY-MMN joint venture. He was told by DW1 that it would not be convenient for the plaintiff to contract directly with the second defendant since the second defendant was in the AAY-MMN joint venture but DW1 assured him that the first defendant had entered into an agreement with AAY-MMN joint venture whereby the first defendant would carry out the entire works in the event the AAY-MMN joint venture was successful in securing the project.

[15] The pre-tender agreement was eventually signed on 9 August 2001 by the plaintiff and the first defendant (exh P13). This agreement stipulates the portion of works PW1 said was due to the plaintiff. As far as PW1 is concerned, he regarded the first and second defendants as companies belonging to DW1 and therefore it made no difference to him whether the first or the second defendant signed P13. To PW1, the first defendant and the second defendant are the same and belong to DW1. Whether it was YCS or AAY, DW1 was the one who made decisions. Therefore PW1 says it does hot matter to him whether it was YCS or AAY that signed the pre-tender agreement.

[16] At a meeting in Kuantan on 1 August 2001, PW1 said that DW4 Mohamed Mokhtar bin Dato' Nadzri from the third defendant asked to what extent can the price be reduced further to make the bid competitive and at what price should AAY-MMN joint venture submit the tender and CP Lim said it should not be more than RM70m. They were then told to reduce the price further and CP Lim reworked the price (exh P17). After a discussion with DW1 and based on CP Lim's price, PW1 said that he produced his own copy (exh P18). The tender price was maintained at RM70m but the rates for earthworks was increased to RM4,290,840. PW1 said he assumed that the tender price submitted would be based on the RM70m since the figures had been carefully computed.

[17] Upon being informed that the tender was successful PW1 said DW1 became evasive. PW1 then issued a letter on 6 February 2001 to DW1 as a reminder and that the plaintiff's portion of works was RM41,933,585.80 (exh P22). However in March 2001 Ng Kai Wai passed to him a bill of quantities offering RM28,269,606.68 for the plaintiff's portion. PW1 asked PW2 to check the bill of quantities and they found that substantial reductions were made in each respective sections (exh P23) and the plaintiff would get RM37,650,095 only. When he saw DW1 about this, he was given a printout of a detailed bill of quantities which DW1 told him reflect the offer made by the AAY-MMN joint venture to DW1 (exh D35). Upon a comparison with the computation done by PW2 (exh P25), they found that

the offer by DW1 to the plaintiff ridiculous. On 23 March 2002 PW1 and PW2 attended a meeting with DW1, Ng Kai Wai and Yip Kok Sun (DW2) where PW1 said he expressed his dissatisfaction with the offer by DW1. The same day PW1 said he sought legal advice and various letters were issued (exh P26, P27).

[18] In cross-examination by counsel for the first defendant the plaintiff said that the plaintiff knew all along that the first defendant intended to carry out the works under section B and C and the portion under section A themselves, except the method related charges. PW1 agreed that the first defendant and the plaintiff signed the pre-tender agreement exh P13 which is the only agreement signed by both parties. Counsel referred PW1 to cl D of exh P13 which reads as follows:

> YCS has agreed and covenanted that he shall engage GEC as the subcontractor for the works in the event and only in the event that YCS is awarded the Project by the Main Contractor. Unless there is amendment in any part of the Tender Document, the Contract Sum for the Works amounting to RM37,994,385.80 (Thirty Seven Million Nine Hundred Ninety Four Thousand Three Hundred Eighty Five Ringgit and Eighty Cents) with method related charges amounting to RM3,939,200.00 (Three Million Nine Hundred Thirty Nine Thousand Two Hundred Ringgit) shall be awarded to GEC.

Counsel puts to PW1 that the above clause shows that the plaintiff's quotation is subject to rationalisation. He agreed that rationalisation could not happen at the pre-tender stage or on the day of tender but the price under cl D was still negotiable and not final.

[19] Counsel for the first defendant referred PW1 to cl E of exh P13 which states that 'All rate submitted by GEC in the tender exercise shall be subjected to rationalisation by YCS in accordance with the main contract rate'. PW1 disagreed with counsel that the reason the first defendant failed to get the subcontract was because the plaintiff refused and/or failed to make their rates competitive.

[20] PW1 was referred to cl F of the pre-tender agreement which provides that 'This pre-tender agreement shall be void if YCS is not awarded the project'. PW1 agreed that based on cl F, the pre-tender agreement is a conditional agreement as it will become void in the event the first defendant is not awarded the project. He agreed that the first defendant did not get the project. Counsel put it to PW1 that based on the clause, the plaintiff has no cause of action against the first defendant since the first defendant was not awarded the subcontract for the project. PW1 said he would not know since as far as he was concerned he was dealing with DW1.

[21] PW1 agreed that the first defendant made two offers ie RM28m and RM32m to the plaintiff but the plaintiff disagreed as the amounts offered did not match the sum in the pre-tender agreement. The plaintiff did not make any counter offer to the first defendant. Under cross-examination by counsel for the third defendant, PW1 agreed that the final tender price would be decided by the AAY-MMN joint venture and his base price for the subcontract would be affected by the tender price.

[22] PW1 agreed that DW1 did not at any time tell him that he represented the AAY-MMN joint venture. However he assumed that DW1 represented the AAY-MMN joint venture since AAY was the third defendant's joint venture partner. He assumed that apart from the first and second defendants, DW1 also represented the third defendant because DW1 brought him to the office of DW4, Mohamed Mokhtar bin Dato' Nadzri. PW1 agreed that the AAY-MMN joint venture did not have a direct subcontract with the plaintiff but the third defendant is sued because it is linked with DW1.

THE DEFENDANTS' CASE

[23] The first and second defendants deny the plaintiff's claim that the first and second defendants had invited the plaintiff to jointly participate with them in a joint venture to submit a tender for the project. The third defendant denies knowledge of this claim by the plaintiff. It is the first defendant's case that the scope and terms agreed upon between the plaintiff and the first defendant had been reduced into writing in the pre-tender agreement signed by the plaintiff and the first defendant (exh P13). It was the understanding that any award of works to the plaintiff would be conditional upon the first defendant successfully securing a subcontract from the AAY-MMN joint venture which is the main contractor, competitiveness of the rates quoted by the plaintiff and the plaintiff's willingness to make the necessary adjustments in accordance with the offer rates from the AAY-MMN joint venture.

[24] DW1 Yip Kok Weng in his witness statement said that the first defendant and the second defendant are separate and independent entities. The first defendant is not a subsidiary or holding company of the second defendant. There are no common shareholders or directors in the first defendant and the second defendant (exhs D44, D45, D46H). The second defendant holds a 'Pusat Khidmat Kontraktor Kelas A' licence which enabled it to secure government projects whereas the first defendant did not hold such a licence but has vast experience and ability in the civil engineering and construction line. The first defendant and the second defendant had a

working arrangement that if the second defendant is able to secure substantial government projects, it may then sub-contract the works or part of the works to the first defendant.

[25] DW1 said it was a common practice for the second defendant to designate him as a project director for the second defendant's projects including this project, mainly for marketing purposes to assist the second defendant to secure government projects as the credentials of the first defendant will enhance the second defendant's image. As project director of the second defendant, DW1 said he has to act within the authority of the managing director of the second defendant, Yip Kok Sun (DW2). For marketing purposes, his business cards carry the names of several companies including the first defendant (exh P5) to show the working relationship between the companies.

[26] DW1 testified that the second and third defendants through the AAY-MMN joint venture applied on 10 January 2001 to pre-qualify and tender for the project as main contractor. It was orally agreed by AAY-MMN joint venture that if the Jabatan Bekalan Air Negeri Pahang Darul Makmur awards the project to the AAY-MMN joint venture as the main contractor, the first defendant would be engaged as the principal subcontractor for the said project, provided that the first defendant's rates will subsequently be in line with the AAY-MMN joint venture's offer rates for the award of the project.

[27] By a letter dated 25 June 2001 from the Jabatan Bekalan Air Negeri Pahang Darul Makmur, AAY-MMN joint venture was invited to submit their tender for the project. The AAY-MMN joint venture then sought to appoint the first defendant as principal subcontractor for the entire works in respect of the project provided the first defendant can comply with the terms of the appointment, in particular the offer rates of the AAY-MMN joint venture, if they successfully secured the award of the project.

[28] The AAY-MMN joint venture requested the first defendant to provide quotation and tender work programme which is an initial or preliminary type of work programme used for tender purposes only. It is a schedule setting out milestones and timetable for completion of works. After a job is awarded, normally another detailed work programme is prepared for the purpose of executing the project. A copy of the tender documents were handed to DW1 by Encik Hazrin bin Basri (DW3) of the third defendant to assist and enable the first defendant to provide its quotation and the tender work programme.

[29] DW1 said as the first defendant was thinking of appointing the plaintiff as a subcontractor, therefore the first defendant approached the

plaintiff and requested the plaintiff to furnish a quotation for the works under sections D-L and a portion of section A for the project which are certain structural works. It was agreed that the plaintiff perform the parts of the works relating to sections D-L and a part of section A called 'method related charges'. Works under sections B and C and part of section A dealing mainly with earthworks would be carried out by the first defendant. The first defendant also approached several other subcontractors and requested them to furnish quotations for the construction works for the project. DW1 said the second defendant had nothing to do with the proposed agreement to subcontract to the plaintiff. He was working for the second defendant as a project director on a personal basis. Since the second defendant was in a joint venture with the third defendant therefore the second defendant cannot make any decision without involving the third defendant.

[30] DW1 said that in his discussion with PW1 it was understood that the plaintiff may not be able to maintain the plaintiff's fixed quote of RM37,994,385.80 for sections D-L and another portion of section A known as 'method related charges' of RM3,939,200 if there is an amendment by the AAY-MMN joint venture to the proposed tender price and that much depends on the eventual offer rates that AAY-MMN joint venture is prepared to give to the first defendant if they are awarded the project. Upon signing of the pre-tender agreement on 9 August 2001 PW1 provided the quotation to the first defendant. DW1 said the pre-tender agreement was to confirm in writing the agreement between the plaintiff and the first defendant, that if the first defendant was awarded the subcontract works by the AAY-MMN joint venture, the first defendant would engage the plaintiff as sub-subcontractor for certain structural works under the tender Bill Sections D, E, F, G, H, I, J, K and L and a certain portion of section A, provided that the plaintiff shall rationalise their rates so as to comply with the rates ultimately proposed by the first defendant based on AAY-MMN joint venture's offer rates to the first defendant for the subcontract.

[31] The pre-tender agreement was made conditional because if, for any reason the AAY-MMN joint venture do not award the subcontract to the first defendant, the first defendant is in no position to appoint the plaintiff as a sub-subcontractor. At that time whether the first defendant are themselves successful in securing the subcontract works would depend on how competitive the rates quoted by the plaintiff would be and their willingness to make the necessary adjustments to be in line with the rates proposed by the first defendant, which in turn is based on the offer rates of the AAY-MMN joint venture for the subcontract works.

[32] DW1 says that PW1 knew that he was signing the pre-tender agreement with the first defendant only as this was the understanding all the

while. If the first defendant does not get the subcontract from AAY-MMN joint venture, the pre-tender agreement will be void. Therefore the plaintiff's quote is expected to be competitive as stated in cl B of the pre-tender agreement. DW1 says that the plaintiff simply cannot expect to provide a quote of RM37,994,385.80 and RM3,939,200 and expect to be awarded the very same amount later on. Much depends on how competitive the plaintiff's rates are, the actual award given by Jabatan Bekalan Air and the offer rates given by AAY-MMN joint venture. DW1 says that except for the pre-tender agreement, there was no other understanding, representation or agreement between the plaintiff and the first defendant. There was also no joint venture, partnership or understanding whatsoever formed between the plaintiff and the first and second defendants.

[33] The tender work programmes and technical schedules were given by the plaintiff to the first defendant for submission to the AAY-MMN joint venture together with the quotations for the tender exercise. DW1 said that when the first defendant prepared the pricing based on the quotation given by the plaintiff as a reference for the purpose of preparing the pricing for the quotation, the first defendant realised that the plaintiff actually underquoted for the first defendant's portion of section A and also sections B and C. The plaintiff suppressed the prices for the first defendant's portion and the first defendant had to make adjustments to the pricing.

[34] The first defendant submitted their quotation and the plaintiff's work programme showing the timeline and the total sub-contract sum of RM65,625,935.17 to AAY-MMN joint venture (exh D31). The first defendant also included its recommended quotes for AAY-MMN joint venture based on the expected margin of 9%–10%. The first defendant intended that the AAY-MMN joint venture would tender to the Jabatan Bekalan Air Negeri Pahang Darul Makmur at the rate of RM71,782,630.56. However AAY-MMN joint venture did not adopt this tender work programme and technical schedules and submitted their own work programme and technical schedules to the Jabatan Bekalan Air Negeri Pahang. DW1 said he was informed by DW3 from AAY-MMN joint venture that AAY-MMN joint venture would not be following the first defendant's quote but would be tendering their own quote of RM69,300,000 instead.

[35] On 24 January 2002 AAY-MMN joint venture faxed a copy of the letter of award from Jabatan Bekalan Air Negeri Pahang Darul Makmur dated 18 January 2002 informing that their tender for the sum of RM69,300,000 is accepted (exh D42). AAY-MMN joint venture offered rates to the first defendant for the sum of RM63,000,000 which was lower than the quotation given (exh D35). DW1 said the downward adjustment from RM71,872,630.56 to RM69,300,000 for the main contract and from

A RM65,625,935.17 to RM63,000,000 for the subcontract amounts to a drop of about 3%–4%. DW1 then requested PW1 to revise their rates to be in line with the main contract rates. However by letter dated 6 February 2002 the plaintiff enclosed the same quotation again and demanded the award of the subcontract (exh P22). The first defendant made a firm offer of
B RM36,385,600.22 to the plaintiff for the plaintiff's portion of works under sections D-L (exh P24) not including method related charges. DW1 requested the plaintiff to rationalise their rates to RM36,385,600.22. The plaintiff refused to revise or reduce and rationalise their rates and PW1 rejected the offer in breach of the pre-tender agreement. Since the plaintiff
C did not agree on the main part of the works which is under sections D-L, discussion on the method related charges for the remaining portion of section A did not take place. DW1 said that plaintiff has no claim based on the pre-tender agreement. The plaintiff could not rationalise their prices. The first defendant also could not get the job as well. This has caused losses to the
D first defendant. Therefore the first defendant counterclaims against the plaintiff for loss of profit. The first defendant wishes to assess damages after the issue of liability is determined. The project was completed by the second and third defendants through the AAY-MMN joint venture.

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[36] On behalf of the first defendant DW1 informed DW4 that the plaintiff refused to revise their rates to make them in line with the offer rates of AAY-MMN joint venture. On or about April, 2002, Mr Yip Kok Sun (DW2) the managing director of the second defendant informed DW1 on
F behalf of the AAY-MMN joint venture that the sub-contract for the said project would not be awarded to the first defendant. DW1 said he then verbally informed PW1 that the subcontract was not awarded to the first defendant and therefore, the pre-tender agreement was void. In response to the plaintiff's solicitors' letter the solicitors for the first defendant wrote to the
G plaintiff's solicitors informing them that the first defendant was not awarded the subcontract by AAY-MMN joint venture due to the plaintiff's refusal to rationalise its rates

[37] PW3 Muhamad Zuki bin Mat Zin was employed by the third
H defendant as project manager for the project from 15 February 2002 until 30 April 2005. He was in charge of supervision of the works, planning the works, construction schedule, material and man power requirements, cash flow and to deliver the works according to the contract schedule. According to PW3 the leader of the AAY-MMN joint venture was the third defendant,
I the majority shareholder. He was aware that it was DW4 who arranged the financing facilities in excess of RM10m for the project. The head of the AAY-MMN joint venture was DW4 with Yip Kok Weng as deputy project director. PW3 would take instructions from DW4, from Yip Kok Weng and from DW3 the contract manager of the third defendant. PW3 said that the

third defendant supplied the entire requirement of concrete for the project besides diesel, machinery and equipment and other construction materials like steel bars. The manpower for the project was supplied by AAY. PW3 said that he had not really heard of the plaintiff and neither did he know whether the plaintiff was involved with the project. PW3 had never heard of the first defendant.

[38] The third defendant in its statement of defence vide para 3.2 avers that it was aware that Yip Kok Weng (DW1) is a director of the first defendant and the project director of the second defendant. According to DW4, the managing director of the third defendant and who was generally regarded as the head of the AAY-MMN joint venture, the person representing the second defendant in the joint venture and with whom DW4 will discuss about the project was Yip Kok Sun. As far as DW1 Yip Kok Weng was concerned, DW4 dealt with him on technical matters only. From the evidence of DW4, DW1 was not regarded as part of the AAY-MMN joint venture.

DECISION

[39] The plaintiff's case against the first and second defendants is premised on the pre-tender agreement signed between the plaintiff and the first defendant and the dealings between PW1 with DW1 who PW1 assumed was representing all the defendants. The claim against the third defendant is on the evidence of PW1 because according to the plaintiff the third defendant knew of the arrangement or understanding between the plaintiff and DW1 and because PW1 assumed that DW1 was also representing the third defendant.

CLAIM AGAINST THE FIRST DEFENDANT

[40] It is to be noted that from the evidence, the pre-tender agreement (exh P13) was executed by the plaintiff and the first defendant after previous drafts were found unacceptable by the first defendant. Hence in my opinion the pre-tender agreement is an agreement which is a culmination of the negotiations between the plaintiff and the first defendant and this agreement embodies all the terms and conditions that the plaintiff and the first defendant intended to rely on to regulate their relationship. The pre-tender agreement manifests the intention of the parties and by virtue of ss 91 and 92 of the Evidence Act 1950 no oral evidence may be adduced to contradict or vary the terms of the agreement.

[41] Both the plaintiff and the first defendant as contracting parties know the terms and conditions of the pre-tender agreement. There is no mention in this agreement of any three party joint venture relationship (see the

plaintiff's letters to the first defendant exhs P22, P26 and P27). If at all there was a three-party joint venture as claimed by the plaintiff, it would appear that such alleged joint venture did not materialise by the time the pre-tender agreement was executed. The pre tender agreement is the only contract executed between the plaintiff and the first defendant. There are no written agreements between the plaintiff and the second defendant, much less the third defendant with whom the plaintiff had no direct dealing at all.

[42] The plaintiff's claim is primarily based on the pre-tender agreement it executed with the first defendant. There is no doubt that PW1 knows that the other contracting party is the first defendant. That is clear from the pre-tender agreement. The continued subsistence of the pre-tender agreement is provided by cl F. It is the intention of the plaintiff and the first defendant that their relationship created through the pre-tender agreement shall end in the event that the first defendant is not awarded the project.

[43] A perusal of the terms of the pre-tender agreement shows that cl D provides that the first defendant will appoint the plaintiff as a sub-contractor *in the event and only in the event that YCS (the first defendant) is awarded the project by the main contractor and that unless there is amendment in any part of the tender document the contract sum for the works mentioned in cl D shall be awarded to the plaintiff*. There is no provision in the pre-tender agreement that the first defendant is bound to give the plaintiff the exact rates that they proposed ie RM37,994,385 for sections D-L. On the contrary cl E allows the first defendant to rationalise the plaintiff's quotation to be in accordance with the main contract price. By cl F it is provided that the *pre-tender agreement shall be void if YCS (the first defendant) is not awarded the project*. Clauses D and F of the pre-tender agreement makes it crystal clear that the first defendant may not necessarily be awarded the sub-contract.

[44] From the evidence the tender price submitted by the AAY-MMN JV to JBA Negeri Pahang was lower than the quotation submitted by the first defendant. The AAY-MMN JV was only prepared to offer the sub-contract to the first defendant at RM63,000,000. Consequently the plaintiff was requested to review its price in order to enable the first defendant to accept the offer from the AAY-MMN JV to be its sub-contractor. There is evidence that the plaintiff refused to do so. The first defendant could not lower the rates to RM63,000,000 because the plaintiff refused to lower their rates from the sum set out in para D of the pre-tender agreement. The approximate offer of RM36,000,000 by AAY-MMN JV to the first defendant for the sections D-L of the project could not even be agreed upon by the plaintiff. This resulted in the first defendant being unable to accept the offer to be the main contractor's sub-contractor.

[45] It is not disputed that the first defendant was not awarded the project. The pre-tender agreement clearly provides that if the first defendant is not awarded the sub-contract, the pre-tender agreement is voided. The plaintiff does not allege that the first defendant has breached the pre-tender agreement. Therefore upon the happening of the event contemplated under cl F, the legal relationship between the plaintiff and the first defendant ended. The pre-tender agreement no longer subsists. For these reasons I agree with counsel for the first defendant and I find that the plaintiff does not have a cause of action against the first defendant. The claim against the first defendant is dismissed with costs to be taxed.

THE FIRST DEFENDANT'S COUNTERCLAIM

[46] With regard to the counterclaim, it is evident that the first defendant was disabled from accepting the offer to be the AAY-MMN JV sub-contractor due to the refusal of the plaintiff to review its price. Hence the first defendant has suffered losses and damages arising out of the plaintiff's action. The first defendant's counterclaim against the plaintiff is allowed with costs and damages to be assessed by the registrar.

CLAIM AGAINST THE SECOND AND THIRD DEFENDANTS

[47] The second and third defendants are not parties to this agreement. The plaintiff sought to show that both the second and third defendants are also liable for the consequences of the act of the first defendant primarily because the plaintiff claims that DW1 represents both the first and second defendants and also the third defendant on the basis that the second defendant is a partner in the joint venture with the third defendant.

[48] The evidence of PW1 shows that there was never any representation made by DW1 that he was representing the second defendant or the third defendant in his negotiations with the plaintiff which culminated in the pre-tender agreement. I accept the evidence of DW1 that though he was the project director for the second defendant, he could not deal with the plaintiff as a representative of the second defendant in view of the fact that the second defendant is a partner in the AAY-MMN joint venture and any decision if made on behalf of the second defendant would have to take into account the third defendant who is the majority shareholder and the controlling partner in the AAY-MMN joint venture.

[49] As regards the joint venture between the second and third defendants, the evidence shows that the financing facilities for the project was secured by the third defendant. It was DW4 who decided the final tender price to be submitted to the Jabatan Bekalan Air. PW3 Muhamad Zuki who was

appointed by the third defendant as project manager for the project states that the overall supervision of the project was exercised by the third defendant. PW3 took instructions from DW4 who is the MD of the third defendant and who was regarded as the boss of the AAY-MMN JV, Yip Kok Weng of the second defendant and DW3, Hazrin bin Basri who was the contract manager of the third defendant. In so far as the joint venture was concerned, DW4 was regarded as the person in control and the third defendant as the controlling partner. Though the evidence suggests that works on the project was undertaken by the second defendant, the third defendant was involved in the supply of machinery, building equipment and construction materials for the project. Having considered the evidence I find nothing to suggest that the AAY-MMN JV was not genuine. Therefore on the evidence I find that the plaintiff has no cause of action against both the second and third defendants. For the aforementioned reasons I dismissed the plaintiff's claim against the second and third defendants with costs to be taxed.

Plaintiff's claims against the first, second and third defendants dismissed with costs first defendants counterclaim against the plaintiff allowed with costs.

Reported by Ashgar Ali Ali Mohamed